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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MINH VAN NGUYEN,

Defendant and Appellant.

D039495

(Super. Ct. No. SCD161626)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Minh Van Nguyen entered a negotiated guilty plea pursuant to *People v. West* (1970) 3 Cal.3d 595 to robbery (Pen. Code, § 211). The court placed him on three years' probation. Nguyen appeals, challenging alcohol-related probation conditions. We affirm.

## BACKGROUND

### *Count 1 (Robbery) and Count 2 (Burglary, dismissed with a Harvey<sup>1</sup> waiver)*

On July 9, 2001, Frank Escobedo returned to his vehicle parked in a Target store parking lot. He found Nguyen in the vehicle, holding Escobedo's compact discs. The car stereo had been removed from the dashboard. Escobedo and Nguyen fought, then a second suspect threw the car stereo at Escobedo, hitting him in the face. Nguyen fled in another car with the second suspect and another person. Fifteen Padres baseball tickets were missing from Escobedo's vehicle.

### *Count 3 (Burglary, dismissed with a Harvey waiver)*

On July 9, 2001, just before the incident with Escobedo's vehicle, Nguyen purchased items at the Target store with a debit card that had been stolen in a vehicular burglary that day. One of the items was a Sony play station vertical stand. A search of Nguyen's home on July 25 turned up a stand matching the one sold by Target.

### *Count 4 (Receiving Stolen Property, dismissed with a Harvey waiver)*

The debit card that Nguyen used at the Target store on July 9, 2001, belonged to Andrew Pogeler. Pogeler believed he had lost the card on July 9. He had last seen it when he left his vehicle in the Pensaquitos Reserve parking lot. He was initially unaware that anyone had broken into his truck, but later found pry marks on the back window.

### *Count 5 (Receiving Stolen Property, dismissed with a Harvey waiver)*

A July 25, 2001 search of Nguyen's vehicle disclosed a piece of paper with the name "Dennis Broyles" written in longhand many times. Broyles had been the victim of

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<sup>1</sup> (People v. Harvey (1979) 25 Cal.3d 754.)

a July 12 vehicular burglary at Pensaquitos Reserve. His American Express card and two pocketknives were taken. The two knives were found in Nguyen's vehicle.

### *The Probation Conditions*

Nguyen, who was 24 years old at the time of the above offenses, has one prior conviction, for shoplifting. According to the probation report, he admitted using or experimenting with marijuana, methamphetamine, psychedelic mushrooms, and alcohol. He began using marijuana in high school, used it a maximum of once a month, last used it a couple of days before being interviewed by the probation officer, and does not believe that he has a problem with marijuana. He experimented with methamphetamine once or twice. He tried psychedelic mushrooms once in high school. He started drinking at age 20 or 21, drinks socially once or twice a month, and does not believe that he has a problem with alcohol. He has never participated in a treatment program.

Due to Nguyen's use of controlled substances, the probation officer recommended standard drug and alcohol probation conditions. The court imposed the following seven conditions: "a. Attend and successfully complete a drug/alcohol counseling program approved by the [probation officer] . . . if directed by the [probation officer]. . . . [¶] b. Complete a program of residential treatment and aftercare if directed by probation officer. . . . [¶] c. Attend meetings of Alcoholics/Narcotics Anonymous or similar organization . . . if directed by the probation officer. [¶] d. [S]ubmit to testing for the use of controlled substances/alcohol when required by the probation or law enforcement officer. [¶] . . . [¶] g. Totally abstain from the use of alcohol. [¶] . . . [¶] j. Whenever requested by the [probation officer], a law enforcement officer, or the court ordered

treatment program, submit to any chemical test of blood, breath, or urine to determine the blood alcohol content and authorize release of results to the [probation officer] or the court. [¶] . . . [¶] 1. Not be in places, except in the course of employment, where alcohol is the main item for sale."

At the sentencing hearing, defense counsel objected to conditions g., j. and l., arguing that Nguyen "does not seem to have a particular problem with alcohol" and is "of legal drinking age."

## DISCUSSION

Nguyen contends that the above alcohol-related probation conditions must be stricken because they are not related to the instant offense and future criminality, and they impair his constitutional rights to privacy and freedom of association.

Because Nguyen did not object below to conditions a., b., c., and d., listed above, he may not do so now. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) We therefore consider his argument only insofar as it relates to the last three conditions, abstention from alcohol use, testing, and avoidance of places where alcohol is the main item for sale.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121, citing Pen. Code, § 1203.1.) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is

valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486.) An otherwise valid probation condition, which impinges on constitutional rights, must be carefully tailored and reasonably related to the government's compelling interest in rehabilitation. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.)

The probation conditions here were designed to aid the probation officer in ensuring that Nguyen complies with the condition requiring that he obey all laws and were well within the trial court's broad discretion. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 60-61, 68-69.) "[T]he use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs." (*People v. Beal* (1997) 60 Cal.App.4th 84, 87.)<sup>2</sup> Additionally, common sense teaches that a diminution in self-control can lead to crime, especially in view of Nguyen's apparently tenuous ability to control his impulse to commit theft offenses.

Nguyen relies on *People v. Kiddoo* (1990) 225 Cal.App.3d 922. In that case, the defendant, a drug user and social drinker, was convicted of possessing methamphetamine. (*Id.* at pp. 924, 927.) Conditions of his probation proscribed consumption of alcohol and frequenting places where it was the chief item for sale. (*Id.* at p. 924.) The reviewing court determined that the record lacked any indication that those conditions were reasonably related to future criminality. (*Id.* at pp. 927-928.) *Kiddoo*, however, has been

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<sup>2</sup> The *Beal* court concluded, "alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense." (*People v. Beal, supra*, 60 Cal.App.4th at p. 87.) As Nguyen points out, *Beal* is distinguishable in that he was not convicted of a drug-related offense. (*Id.* at pp. 85, 87.) Nevertheless, the *Beal* court's statement, quoted in the text *ante*, remains true here.

criticized by this court. (*People v. Balestra, supra*, 76 Cal.App.4th at p. 69 ["*Kiddoo* . . . is simply inconsistent with a proper deference to a trial court's broad discretion in imposing terms of probation"]; *People v. Beal, supra*, 60 Cal.App.4th at pp. 86-87 ["[W]e disagree with the fundamental assumption in *Kiddoo* that alcohol and drug abuse are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse."].)

In light of Nguyen's use and experimentation with several illicit drugs at a young age, his continued marijuana use, his refusal to acknowledge that he had a problem with marijuana, and his drinking, the trial court did not abuse its discretion by imposing conditions designed to help him remain sober. The conditions here were reasonably devised to deter him from future criminality and thus protect public safety. If he believed that the conditions were unduly harsh, he was entitled to decline probation and undergo sentence. (*People v. Beal, supra*, 60 Cal.App.4th at p. 87.)

#### DISPOSITION

Judgment affirmed.

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McCONNELL, J.

WE CONCUR:

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BENKE, Acting P. J.

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NARES, J.